Public Prosecutor v Hafiszamri bin Ahmad & Anor

COURT OF APPEAL (PULAU PINANG) — CRIMINAL APPEAL NO P05–79 OF 2000
MOHD GHAZALI, SURIYADI AND HASAN LAH JJCA
18 DECEMBER 2006

Criminal Procedure — Trial — Prosecution's case — Standard of proof — Trial judge applied wrong standard of proof — Whether judge would still have come to the same conclusion had he used the correct standard of proof

Evidence — Proof of — Possession — Conduct of accused consistent with their having known of the presence of the drugs — Whether possession proved

Evidence — Witness — Interested witness — Whether evidence should be accepted — Whether accused entitled to benefit of anything which could be elicited from prosecution's evidence

Acting on information received a team of police raided a bungalow house at Kepala Batas, Pulau Pinang ('the house'). In the second room PW6 found 65 packages containing compressed dried leaves which were cannabis. In the living room PW6 confiscated several documents belonging to the two respondents. The first respondent who was hiding on the ceiling and the second respondent squatting behind a water tank were arrested during the raid. The respondents were charged with trafficking in 63,088g of cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). They were acquitted and discharged at the end of the prosecution case by the learned trial judge. The prosecution appealed against the decision. The issues were; (1) whether the learned trial judge erred when he applied the beyond reasonable doubt standard of proof at the end of the prosecution's case; and (2) had the prosecution made out a prima facie case at the end of its case that the drugs in question were in the joint possession of the two respondents on that day. The prosecution submitted that the learned trial judge had erred when he concluded that there was a reasonable possibility from the prosecution's evidence that there were other occupants in the house besides the two respondents. In pursuing this issue, the learned DPP pointed out the unlikely existence of other occupants.

Held, dismissing the appeal:

(1) The offence took place on 9 July 1997. Section 180(1) of the Criminal Procedure Code was amended on 31 January 1997 whereby it was provided that the standard of proof on the prosecution at the close of its case is to make out a prima facie case. Notwithstanding that, it is settled law that at the end

of the case for the prosecution the court is required to undertake a maximum evaluation of the evidence adduced by the prosecution when deciding whether or not to call on the accused to enter upon his defence (see para 15).

(2) The accused was entitled to the benefit of anything which could be elicited from the prosecution evidence. The learned trial judge accepted the evidence of PW3 on the existence of the Indonesian woman in the house (see paras 23–24); *Leow Nghee Lim v Reg* [1956] MLJ 28 followed.

(3) As regards the conduct of the two respondents whereby they were found hiding on the ceiling of the house when the police raided the house, that conduct was, as rightly held by the learned trial judge, consistent with their having known of the presence of the drugs in the second room. However, such conduct considered together with the other evidence could not give rise to an inference that the drugs were under their physical or control, as an innocent man faced with the prospect of arrest on a capital charge might foolishly react in that way (see para 26); *Abdullah Zawawi bin Yusoff v PP* [1993] 3 MLJ 1 followed.

(4) The learned trial judge had undertaken a maximum evaluation of the evidence adduced by the prosecution when making his finding of facts that the two respondents did not have exclusive possession of the drugs in question. In spite of the fact that the learned trial judge had applied the wrong standard of proof, he would have come to the same conclusion had he used the correct standard of proof at the end of the prosecution case based on the evidence before him (see para 28).

[Bahasa Malaysia summary

Bertindak atas maklumat yang diterima, sepasukan polis menyerbu sebuah rumah banglow di Kepala Batas, Pulau Pinang ('rumah tersebut'). Di dalam bilik kedua PW6 telah menjumpai 65 bungkusan yang mengandungi daun kering mampat yang mana adalah kanabis. Di ruang tamu PW6 menyita beberapa dokumen kepunyaan kedua-dua responden. Responden pertama yang bersembunyi di atas syiling dan responden kedua bercangkung di belakang tangki air telah ditahan semasa serbuan. Responden-responden telah didakwa dengan pengedaran 63,088g kanabis di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut'). Mereka telah dibebaskan dan dilepaskan di akhir kes pendakwaan oleh yang arif hakim bicara. Pendakwa raya merayu terhadap keputusan. Isu-isunya adalah (1) sama ada yang arif hakim bicara melakukan kesilapan apabila beliau menggunakan melangkaui batas keraguan dalam tahap pembuktian di akhir kes pendakwaan; dan (2) adakah pihak pendakwaan dapat menunjukkan satu kes prima facie di akhir kesnya yang mana dadah yang dipersoalkan adalah di dalam milikan bersama kedua-dua responden pada hari tersebut. Pihak pendakwaan menghujahkan bahawa yang arif hakim bicara melakukan kesilapan apabila beliau menyimpulkan bahawa terdapatnya kemungkinan yang munasabah daripada bukti pendakwaan yang mana terdapatnya penghuni yang lain di dalam rumah selain kedua-dua responden. Dalam mendalami isu ini, DPP yang bijaksana menunjukkan bahawa berkemungkinan tinggi kewujudan penghuni lain adalah tiada.

Diputuskan, menolak rayuan:

(1) Kesalahan telah berlaku pada 9 Julai 1997. Seksyen 180(1) Kanun Tatacara Jenayah telah dipinda pada 31 Januari 1997, yang mana menyatakan bahawa tahap pembuktian terhadap pendakwaan semasa penutupan kesnya hendaklah menunjukkan satu kes prima facie. Walaupun demikian, ianya adalah undang-undang mantap di mana di akhir kes pendakwaan, mahkamah adalah dikehendaki untuk mendapatkan penilaian bukti yang maksimum yang dikemukakan oleh pihak pendakwaan apabila memutuskan sama ada memanggil atau tidak tertuduh untuk memasukkan pembelaannya (lihat perenggan 15).

(2) Tertuduh adalah berhak ke atas kelebihan apa-apa sahaja yang boleh ditimbulkan daripada bukti pendakwaan. Yang arif hakim bicara telah menerima keterangan PW3 berkenaan dengan kewujudan wanita Indonesia di dalam rumah (lihat perenggan 23–24); *Leow Nghee Lim v Reg* [1956] MLJ 28 diikut.

(3) Berkenaan dengan perlakuan kedua-dua responden yang mana mereka didapati bersembunyi di atas syiling rumah semasa polis menyerbu rumah tersebut, perlakuan tersebut yang mana benar diputuskan yang arif hakim bicara, selaras dengan pengetahuan mereka akan terdapatnya dadah di dalam bilik kedua. Tetapi perlakuan tersebut diambil kira bersama dengan keterangan lain tidaklah boleh memberikan satu kesimpulan bahawa dadah tersebut di bawah jagaan atau kawalan fizikal mereka, sebagai seorang yang tidak bersalah dengan kemungkinan ditangkap di atas dakwaan yang sangat serius memungkinkan bertindak kurang bijak seperti demikian (lihat perenggan 26) *Abdullah Zawawi bin Yusoff v PP* [1993] 3 MLJ 1 diikut.

(4) Yang arif hakim bicara telah mengambil penilaian bukti yang maksimum yang dikemukakan oleh pihak pendakwaan apabila membuat penemuan faktanya yang mana kedua-dua responden tidak mempunyai milikan eksklusif ke atas dadah yang dipersoalkan. Walaupun yang arif hakim bicara telah menggunakan tahap pembuktian yang salah, dia akan sampai kepada kesimpulan yang sama dengan menggunakan tahap pembuktian yang sebenarnya di akhir kes pendakwaan berdasarkan kepada keterangan di hadapannya (lihat perenggan 28).]

Notes

For a case on proof of posession, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 2214.

For cases on interested witness, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2786–2790.

For cases on prosecution's case, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 4574–4583.

Cases referred to

Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1 (folld)
Balachandran v PP [2005] 2 MLJ 301 (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393 (refd)
Leow Nghee Lim v Reg [1956] MLJ 28 (folld)

Legislation referred to
Criminal Procedure Code s 180(1)
Dangerous Drugs Act 1952 ss 2 39B(1)(a), (2)

Nurul Nur'aini Mohd Noor (Attorney General's Chambers) for the appellant.
Ranjit Singh Dhillion (J Kaur Ranjit & Associates) for the first respondent.
K Kumaraendran (Kumar & Co) for the second respondent.

Hasan Lah JCA (delivering judgment of the court):

INTRODUCTION

[1] The two respondents were charged with trafficking in 63,088g of cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the Act. The charge read as follows:

> Bahawa kamu secara bersama pada 9 Julai 1997 jam lebih kurang 8.30 pagi, di No 11A, Lorong Rupawan 6, Taman Rupawan, Kepala Batas, di dalam Daerah Seberang Perai Utara di dalam Negeri Pulau Pinang, telah mengedar dadah berbahaya, iaitu 63,088g cannabis, dan dengan itu kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 (Semakan 1980), dan boleh dihukum di bawah s 39B(2) Akta yang sama.

[2] They were acquitted and discharged at the end of the prosecution case by the learned trial judge. This is an appeal by the public prosecutor against the decision. On 13 November 2006, we unanimously dismissed the appeal after hearing submissions from the deputy public prosecutor ('DPP') and the counsel for the respondents.

FACTS

[3] The salient facts adduced by the prosecution can be summarized as follows. On 9 July 1997 at about 8.30am, acting on information received DSP Idris bin Ab Rafar (PW6) with a team of police personnel comprising three officers and six detectives raided a bungalow house at No 11A, Lorong Rupawan 6, Taman Rupawan, Kepala Batas, Pulau Pinang ('the house'). According to PW6 at the scene he saw a motorvan and a motorcycle under the porch of the house. The main gate was locked. PW6 and his men entered the compound of the house by climbing over the fence. PW6 went to the front door of the house and opened the unlocked grille. PW6 knocked on the front door of the house and identified himself. Seeing there was no response from the occupier of the house PW6 asked Inspector Nordin bin Ibrahim ('PW9') and Inspector Anderson to go to the back portion of the house. PW9 and Insp Anderson entered the house by breaking open the wooden door of the rear portion of the house. Once inside the house, they opened the front door to let the other members of the team, including PW6, into the house.

[4] According to PW6, there was nobody in the living room and the other rooms in the house were not locked except for the second room. Insp Anderson then forced

A open the door of the second room. In the second room PW6 found 65 packages containing compressed dried leaves believed to be cannabis. In the living room PW6 confiscated several documents belonging to the two respondents. In the master bedroom, PW6 saw a wardrobe, mattresses and clothes. The attached bathroom was wet and there were soap and toothbrush in the bathroom. In the living room there was a rack and a hi-fi set. The third and fourth rooms were empty. PW6 did not take possession of the keys to the house.

[5] Under cross-examination, PW6 said there was a toy racing car in the third room. In the dining room, there was a rack for keeping clothes.

[6] PW9 stated in his evidence that while he was inside the house he heard somebody saying that there were people on the roof of the house. PW9 saw an opening in the ceiling located between the third and the fourth room. He instructed whoever on the ceiling to come down while pointing his pistol towards the direction of the opening. He then saw a ladder (exh P27(18)) being lowered down through the opening. The first respondent came down through the opening. He was arrested by PW9.

[7] Chief Insp Shanmugam s/o Perumal (PW10) was a member of the raiding team. In his evidence he stated that he went up to the ceiling to check and he found the second respondent squatting behind a water tank. He then arrested the second respondent.

[8] The house belong to Dr Syed Azizi Wafa bin Syed Khalid Wafa (PW11) who was staying with his family in another house situated infront of the house. According to PW11 he rented out the house to the two respondents in the month of May or June 1997. The rent for June was paid by the first respondent and the rent for the second month (July) was paid by the second respondent. He gave a set of keys for the house to the first respondent.

[9] Under cross-examination, he said the house was occupied by the two respondents. He could see them at the house on the weekends. However he could not say how many people were staying in the house on weekdays. He never saw any woman or children in the house as he was away working during the weekdays. In June 1997, he saw a Proton Putra car and a motorcycle at the house. On re-examination, he said the Proton Putra car was parked under the porch of the house and it was normally covered. He did not know who was the owner of the Proton Putra car. He also said there was a Proton Wira car parked by the roadside and the owner of that car could be his neighbour.

[10] PW4 (Hussain bin Mohd Din) was the owner of the Suzuki motorcycle bearing registration number PBW 1725 which was parked under the porch of the house when the police raided the house. The second respondent was his son-in-law.

He testified that the second respondent borrowed the motorcycle from him four days prior to the day of the incident. PW5 (Azizan bin Osman) was the registered owner of the Nissan Vanette motovan bearing registration number PBN 7444 which was also parked under the porch of the house on the day of the incident. The first respondent was his nephew. The motorvan was used by his brother, Ahmad bin Osman, who was the father of the first respondent.

[11] PW3, Siti Hajar bte Hussain, is the wife of the second respondent. They have five children from the marriage. According to PW3 from April to July 1997 the second respondent was staying in their house at No 222 Blok A, Sg Nibong, Bayan Lepas. The second respondent was working as an attendant at the Penang General Hospital. She said she and her children have never been to the house at No 11A, Taman Rupawan.

[12] Under cross-examination she said the investigating officer (PW15) has handed over to her a big barrel containing clothes.

[13] PW15, Chief Inspector Aziz bin Ahmad, was the investigating officer in this case. He went to the house on the same day at about 9.45 am. At the house he met PW6 and was briefed by the latter about the case. PW15 drew a sketch plan of the house which was tendered in court as exh P27A. He confirmed that the 65 packages of cannabis were found in the second room and there was no furniture inside the room. He found a bunch of keys hanging on the wall between the living room and the dining room. There were eight keys and seven of the keys could open the main door and the grille, the doors to the master bedroom and the other three rooms and the backdoor of the house. On 15 July 1997, he went to the house again and found another eight keys in the living room. He also took possession of several clothes from the master bedroom and the living room. He went to the house again on 22 July 1997 and took possession of all the things found in the house.

[14] In his evidence the chemist, PW2, stated after chemical analysis, he found that the 65 packages containing the compressed dried leaves was cannabis as defined under s 2 of the Dangerous Drugs Act 1952 with a total weight of 63,088 grams.

THE STANDARD OF PROOF

[15] One of the grounds raised in this appeal by the learned DPP is that the learned trial judge has erred when he applied the beyond reasonable doubt standard of proof at the end of the prosecution's case. We agree with the learned DPP on this point. The offence took place on 9 July 1997. Section 180(1) of the Criminal Procedure Code was amended on 31 January 1997 whereby it was provided that the standard of proof on the prosecution at the close of its case is to make out a prima facie case. Notwithstanding that, we are mindful that it is settled law that at the end of the case for the prosecution the court is required to undertake a maximum evaluation of the evidence adduced by the prosecution when deciding whether or not to call on the accused to enter upon his defense (see *Balachandran v Public Prosecutor* [2005] 2 MLJ 301).

A POSSESSION

[16] The main argument before us centred on the issue of possession. Has the prosecution made out a prima facie case at the end of its case that the drugs in question were in the joint possession of the two respondents on that day?

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[17] It was the contention of the learned DPP that the prosecution has done so in this case having regard to the evidence adduced, both direct and circumstantial, as a whole. She pointed out that the drugs in question were found in the second room which was locked and the key to this room was found hanging on the wall together with the other keys of the house. In addition to that both the respondents were found C hiding on the ceiling of the house when the police raided the house.

[18] The learned trial judge was of the view that there is no direct evidence to show that the two respondents had knowledge of the existence of the drugs in the second bedroom. This is what he said in his judgment:

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> Pemilikan bermakna tertuduh 1 atau tertuduh 2 atau kedua-duanya tahu tentang adanya ganja di bilik No 2 itu dan tertuduh 1 atau tertuduh 2 atau kedua-duanya boleh melupuskan ganja itu. Dalam kes ini tidak ada keterangan 'direct' yang mereka tahu tentang ganja itu, keterangan yang ada ialah 'indirect evidence' yang apabila dirangkumkan kesemuanya menunjukkan atau menjurus bahawa tertuduh 1 & 2 tahu tentang ganja itu. E Selain dari itu terdapat satu andaian undang-undang bahawa tertuduh 1 & 2 dianggap menduduki premis itu kerana rumah itu adalah di bawah jagaan dan kawalan mereka.

[19] What constitutes possession? In *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393, the Federal Court has made the following observation on this F point:

> Now, as to what the ingredients of possession in law has been established by a long line of cases. We find it unnecessary to discuss all of them here. Suffice that we refer to two of them. In *Toh Ah Loh & Mak Thim v R* [1949] MLJ 54, Gordon-Smith Ag CJ when delivering judgment of the Singapore Court of Appeal explained the meaning in law of the word G 'possession' when appearing in the statute. His Lordship said:
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> > Possession, in order to incriminate a person, must have the following characteristics. The possessor must know the nature of the thing possessed, must have in him a power of disposal over the thing, and lastly must be conscious of his possession of the thing. If these factors are absent, his possession can raise no presumption of mens rea, without H which (except by statute) possession cannot be criminal.
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> The second is *Saad Ibrahim v Public Prosecutor* [1968] 1 MLJ 158 where Yong J stressed the necessity of establishing the ingredient of knowledge on the part of an accused before he could be incriminated with possession. His Lordship there said:

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> > In my opinion mere possession is one thing and possession with mens rea is another. Possession which incriminates must have certain characteristics. The possessor must be aware of his possession, must know the nature of the thing possessed and must have the

power of disposal over it. Without these characteristics possession raised no presumption of mens rea. Without mens rea possession cannot be criminal except in certain cases created by statute, which is not applicable in this case.

We would also mention the learned judgment of Lim Beng Choon J in *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585, which contains a full discussion of the several cases on the point.

We accept these authorities as correctly stating the law. It follows that where the prosecution seek to prove trafficking by relying on s 37(da), it must prove at the trial, all the ingredients of possession set out in the cases of *Toh Ah Loh* and *Mak Thim* and *Saad Ibrahim*.

[20] Possession therefore encompasses the element of physical control as well as an element of knowledge. In this case the learned trial judge has made a finding that the drugs in question might not be under the physical control of the two respondents. This is what he said in his judgment:

Saya dapati ada keterangan di dalam kes pendakwaan yang menunjukkan kemungkinan munasabah adanya orang lain menduduki rumah itu yang jika diterima kemungkinannya, ia boleh menafikan pemilikan eksklusif tertuduh 1 & 2 tentang ganja itu.

Further down, he said:

Pegawai perampas ekshibit pula merampas empat handphone bimbit yang kemudian disita. Pegawai penyiasat juga melihat cekak rambut/hair-band wanita di bilik air bilik No 1. Keterangan saksi pandakwa ini menunjukkan kemungkinan munasabah tentang adanya orang lain menduduki rumah itu pada atau sebelum diserbu. Kehadiran perempuan Indonesia itu adalah jelas. Kehadiran pemandu/pemilik kereta Proton Putra dan kehadiran orang yang memakai pakaian kilang SONY tidak jelas tetapi ia mengundang keraguan yang munasabah. Pendakwa gagal menghakiskan keraguan ini dengan mendapatkan penjelasan lanjut dari saksi-saksi itu.

[21] Before us, the learned DPP submitted that the learned trial judge has erred when he concluded that there was a reasonable possibility (kemungkinan munasabah) from the prosecution's evidence that there were other occupants in the house besides the two respondents. In pursuing this issue, the learned DPP pointed the existence of other occupants was highly unlikely for the following reasons:

(i) although a hair-band was found in the bathroom, no female clothing was found in the house;

(ii) although a Proton Putra car was found parked under the porch of the house, no items were found in the house to show the existence of another occupant;

(iii) the second room where the drugs were found was only used as a store for drugs; the key to the second room was found hanging on the wall with other keys.

[22] The learned DPP then pointed out the act of the two respondents in hiding in the ceiling of the house was not consistent with their innocence. She also urged this court to be cautious of PW3's evidence as she was an interested witness.

[23] Before we proceed to consider the learned DPP's argument we think it is not out of place to refer to the judgment of Taylor J. in *Leow Nghee Lim v Reg* [1956] MLJ 28. At p 29, Taylor J said:

> In my view this argument takes insufficient account of the particular facts proved. An accused is entitled to the benefit of anything which can be elicited from the prosecution evidence; the onus is on the prosecution to adduce convincing evidence of the facts necessary to raise a presumption before the onus on any issue is shifted.

[24] We believe that the learned trial judge has applied the principles of law established in *Leow Nghee Lim*'s case cited above that the accused is entitled to the benefit of anything which can be elicited from the prosecution evidence. The learned trial judge accepted the evidence of PW3 on the existence of the Indonesian woman. This is what PW3 said in her evidence, under cross-examination:

> Insp Aziz ada beri kepada saya selepas tangkapan, baju lelaki, baju perempuan, baju kanak dan seluar, pakaian kilang SONY.
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> P27(12) Saya ditunjuk 2, 3 helai baju ini. Saiz baju lelaki itu XL. Baju itu bukan baju suami saya. Aziz bagi saya baju dalam tong besar. Saya ambil bawa balik. Saya tak tahu baju siapa, baju perempuan dan kanak-kanak bukan saya punya. Saya tak tahu siapa punya.
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> Seorang perempuan Indonesia datang ambil baju perempuan dan kanak-kanak dari saya. Dia tidak pasti dia minta baju lelaki XL itu, dia cari sendiri dalam kotak. Saya marah. Saya tak pasti dia ambil baju XL itu.
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> Keterangan saya di mahkamah benar. Saya ambil almari dan tilam dari B/P. la bukan kepunyaan suami saya. Perempuan Indonesia itu minta almari dan tilam. Saya tak bagi. Almari dan tilam terbakar dengan rumah saya di Blok A, Sg Dua.

[25] We have no reason to disagree with the decision of the learned trial judge on the evidence of PW3 as he had the opportunity to see and hear PW3 giving evidence in court. Furthermore PW3's evidence was consistent with the evidence of other witnesses for the prosecution. The investigating officer has clearly stated in his evidence that he took possession of all the items found in the house including the clothes from the wardrobe. He was not sure whether there were female and children's clothes among the clothes taken. Later on he handed over all the clothes to PW3. There was also the evidence of PW11 that he saw a Proton Putra car parked under the porch of the house. These evidence lend credence to what was said by PW3 regarding the Indonesian woman.

[26] As regards the conduct of the two respondents whereby they were found hiding on the ceiling of the house when the police raided the house, that conduct was, as rightly held by the learned trial judge, consistent with their having known of the presence of the drugs in question in the second room. However such conduct considered together with the other evidence cannot, in our view, give rise to an inference that the drugs were under their physical custody or control. We agree with

the observation made by Edgar Joseph Jr SCJ in *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1 that an innocent man faced with the prospect of arrest on a capital charge might foolishly react in that way. At p 9 of that case, Edgar Joseph Jr SCJ said:

> We now come to what does seem to us to be evidence of a potent kind against the appellant, namely his conduct in taking to his heels upon Insp Mat Yusoff announcing the discovery of the drugs in the box. This conduct of the appellant was consistent with his having known of the presence of the drugs in the box before their discovery, indicating thereby a sense of guilt.
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> On the other hand, it was conduct equally consistent with the appellant having been in a state of pure panic, bearing in mind that it was only after Insp Mat Yusoff announced the discovery of the drugs that the appellant took to his heels. An innocent man faced with the prospect of arrest on a capital charge might foolishly react in that way. It is true that the appellant himself denied running away but we agree with the judge that the appellant lied on this point, but this does not preclude us from drawing such inferences as may be justified from the evidence adduced by the prosecution. The Jamaican Privy Council case of *DPP v Brooks*, cited to us by the learned deputy public prosecutor, where the accused, who occupied the driver's seat of a stationary van which contained more than 1000 Ibs of ganja, together with several others in the van, scrambled out and ran off, when police officers hurried towards the van, is, therefore, readily distinguishable.

[27] In our deliberation we also took cognizance of the facts that the two respondents were jointly charged for the offence and the view of the learned trial judge that other person or persons may also be occupants of the house. In this regard we share the views expressed by Lord Goddard CJ in *R v Abbott* which was cited with approval in *Abdullah Zawawi*'s case at p 6:

> In this context, we are reminded of the case of *R v Abbott*, where Lord Goddard CJ delivering the judgment of the Court of Appeal of England, said this (at p 901E–G):
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> > … If two people are jointly indicted for the commission of a crime and the evidence does not point to one rather that the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case. If, in those circumstances, it were left to the defendants to get out of it if they could, that would put the onus on the defendants to prove themselves not guilty. Finemore J remembers a case in which two sisters were indicted for murder, and there was evidence that they had both been in the room at the time the murder of the boy was committed; but the prosecution could not show that sister A had committed the offence or that sister B had committed the offence. Very likely one or the other must have committed it, but there was no evidence which, and although it is unfortunate that a guilty party cannot be brought to justice, it is far more important that there should not be a miscarriage of justice and that the law should be maintained that the prosecution should prove the case

[28] We are satisfied that the learned trial judge has undertaken a maximum evaluation of the evidence adduced by the prosecution when making his finding of facts that the two respondents did not have exclusive possession of the drugs in question. In spite of the fact that the learned trial judge has applied the wrong

standard of proof we are satisfied that he would have come to the same conclusion had he used the correct standard of proof at the end of the prosecution case based on the evidence before him. We are also satisfied that the learned trial judge has not erred in his analysis of the evidence and the application of the relevant principles of law thereto. For these reasons, we dismissed this appeal.

Appeal dismissed.

Reported by Loo Lai Mee